UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/813
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 813

Case No. 859: EMBLAD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 10 February 1995, Mats Wilhelm Emblad, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 May 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to:

> "(a) Uphold and demand the implementation of the Joint Appeals Board's recommendations. ...
>
> (b) Investigate the extent to which the United Nations Rules and Regulations and Procedures have been neglected or violated in the handling of this case, as well as the extent to which my human rights, in particular my right to due process, have been violated.
>
> (c) Sanction and reprimand those responsible for not adhering to and respecting United Nations Rules and Regulations and Administrative Instructions from the Secretary-General (instructions concerning the filing of adverse material, the use of legally questionable evidence material), and for denying me a hearing of the case.

(d) Investigate and clarify the processes leading to the Under-Secretary-General's decision to reject the recommendations of the Joint Appeals Board, without further hearing.

(e) Award me appropriate compensation for the loss of my United Nations employment and the incurred pain and suffering caused by the accusations, harassment and defamation I have been subjected to."

Whereas the Respondent filed his answer on 18 January 1996;

Whereas the Applicant filed written observations on 30 June 1996;

Whereas, on 24 October 1996, the Applicant submitted additional observations to the Tribunal;

Whereas, on 28 October 1996, the Tribunal notified the parties, pursuant to article 18 of the Rules of the Tribunal, of a defect in procedure that would warrant remand of the case, in accordance with article 9, paragraph 2 of the Tribunal's Statute, and requested the Respondent to notify the Tribunal whether he wished the appeal to be remanded for institution of the required correction of procedure or whether the Tribunal should decide on the substance of the case;

Whereas, on 29 October 1996, the Respondent advised the Tribunal of his preference that the Tribunal adjudicate the case;

Whereas, on 6 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 8 and 15 November 1996;

Whereas, on 3 December 1996, the Tribunal informed the parties that it had decided to adjourn consideration of the case to its next session, commencing on 30 June 1997;

Whereas, on 31 January 1997, the Respondent submitted additional documents to the Tribunal, in response to the Tribunal's questions posed on 6 November 1996;

Whereas, on 11 February 1997, the Tribunal requested the Applicant to provide it with his views on the Respondent's answers

to the questions posed on 6 November 1996, which the Applicant did, on 22 May 1997;

Whereas, on 22 May 1997, the Applicant requested the production of certain documents;

Whereas, on 26 June 1997, the Applicant submitted additional observations to the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 8 April 1991, pursuant to the Junior Professional Programme, as an Associate Repatriation Officer, on a one year fixed-term appointment, at the P-2, step I level. He was assigned to Guatemala City, Guatemala, for a period of one year. The Applicant's appointment was extended twice, for two further fixed terms of one year. On 1 May 1992, he was assigned to Betel, Guatemala. On 1 November 1992, he was reassigned, as an Associate Programme Officer, to Santo Domingo, Dominican Republic.

With effect from 1 November 1993, the Applicant was selected for the post of Programme Coordination Officer, Programme Coordination and Budget Section, at UNHCR Headquarters. He was offered a one year fixed-term project personnel appointment at the L-2, step III level. The offer of appointment was sent to the Applicant and he signed it on 1 November 1993. This appointment was extended on 1 November 1994, for a further period of one month, two weeks and one day, to 15 December 1994, and thereafter to 31 January, 28 February and 31 March 1995, when he separated from service.

While the Applicant was serving in the Dominican Republic, dealing with refugees from Yugoslavia, allegations of misconduct were raised against him in relation to the resettlement in the U.S.A. of 19 Montenegrin refugees. The Applicant was alleged to have planned to make arrangements for refugees to resettle in the United States, in return for a fee of $16,000 per person.

The allegations were investigated between 17 and 24 September 1993, by a team (hereinafter the Investigation Team) consisting of the Chief, Internal Audit Section, United Nations Office at Geneva (UNOG), the Director, Division of Human Resources Management (DHRM), UNHCR, and the Regional Programme Officer, UNHCR. Refugees in the Dominican Republic, their relatives in the U.S.A., UNHCR Staff Members and the Applicant were interviewed. A tape-recorded conversation between the Applicant and some of the refugees was reviewed. The Applicant claims that this tape was fabricated, and that it does not reflect the true content of the conversation at issue.

On 24 September 1993, the Director, DHRM, sent a memorandum to the Applicant, attaching the report of a "Preliminary Investigation of the Allegations of Misconduct regarding Mr. Mats Emblad" (hereafter the Report) and requested comments from the Applicant. The Director, DHRM, simultaneously apprised the Applicant of his right to counsel.

On 7 October 1993, the Applicant submitted comments to the Director, DHRM. In his comments, the Applicant explained that fear for his safety had been the sole motivating factor for his statements made on the tape, since he had received repeated threats on his life. He stated:

> "... Foolishly I instead tried to dissuade them from any further contacts by referring to high price for the other, i.e. illegal ways to enter the U.S.A. Therefore, when Mr. ... telephoned me at the office, I made the unfortunate reference to the USD 16,000. I did however, reiterate that I personally would not be involved in any illegal operation."

Shortly thereafter, on 18 October 1993, a new director of DHRM assumed his functions at the Office of the High Commissioner.

On 22 October 1993, following normal appointment procedures, the Administration sent a formal letter of reappointment to the Applicant offering him a position at UNHCR Headquarters in Geneva.

On 1 November 1993, the Applicant signed a Letter of Appointment and assumed his duties.

On 4 February 1994, the new Director of DHRM met with the Applicant to discuss the allegations against him and, in particular, the tape recording referred to above. In a memorandum dated 11 May 1994, the Director, DHRM, after reviewing the tape, acknowledged that some parts of the tape had been spliced together. However, he believed the relevant portions of the tape to be a recording of one integral conversation. He attached a transcript of this conversation to his memorandum to the Applicant.

On 13 May 1994, the Director, DHRM, informed the Applicant that his appointment would not be extended after its expiration date of 31 October 1994. On 16 May 1994, the Applicant wrote to the Director, DHRM, and to the Deputy High Commissioner, contesting the "re-opening" of the case.

On 19 May 1994, the Director, DHRM, informed the Applicant that the case had never been closed. He stated that the decision to give the Applicant a new appointment had been taken before the allegations against him had been fully investigated. Furthermore, as a result of a change in the Office of DHRM in mid-October 1993, there had not been sufficient time to take a final decision on the Applicant's case.

On 28 June 1994, the Applicant wrote to the Secretary-General, requesting the direct submission of his appeal to the Tribunal. This request was denied.

On 19 July 1994, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 29 November 1994. Its conclusions and recommendations read as follows:

> "40. ..., the Panel concludes that the handling of the case by the Administration contained some irregularities and that, by denying due process to the Appellant in accordance with

the Staff Rules and Regulations, it was detrimental to the interests and rights of the Appellant.

41. In view of the above, the Panel recommends that the rights of the Appellant should be fully restored, i.e. (i) all the documents removed from the Official Status File of the Appellant should be returned to the File; and (ii) his contract should be extended for a period of one year, as recommended by his supervisor in a memorandum dated 5 September 1994, and that the case be referred to the Joint Disciplinary Committee, as provided for under Chapter X of the Staff Rules and Regulations, to establish if there is sufficient evidence to substantiate the allegation of serious misconduct which would warrant disciplinary action. In the event that the Appellant is cleared of the allegation of serious misconduct, these events should not affect his career prospects within the Organization.

42. The Panel makes no further recommendation in support of this appeal."

On 13 January 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The incidents in which you have been involved in 1993, in the Dominican Republic, are of a grave and serious nature. Your admission that you offered to make 'arrangements' for refugees at a price of $16,000 per person and your other statements during the investigation confirm that you did not exercise sound judgement in your functions at UNHCR. Such unsatisfactory performance is well below the standards required from an international official and tarnishes the image of the United Nations as well as the work of your colleagues who act with integrity.

While the so called threat to your life may be a mitigating factor in your favour, it nevertheless does not justify your poor performance, actions and statements with the refugees. Furthermore, the Secretary-General can not accept the view of the JAB when it refers to the special procedure of regulation 9.1 (a) which does not apply in your case, nor accept the JAB's opinion that this matter be considered at the disciplinary level, an issue which is beyond its competence as stated in paragraph 30 of the Report.

Considering that there was no commitment nor expectancy of renewal of your contract and in the use of his discretionary authority, following a complete review of the facts of this case, the Secretary-General finds no reason to reverse the decision not to renew your contract."

On 17 May 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to refer the Applicant's case to a joint disciplinary committee for proper consideration of the allegations of misconduct. In not doing so, the Respondent acted in contravention of the procedures required by the Staff Rules.

2. In re-opening the case after offering him an appointment, the Respondent subjected the Applicant to double jeopardy.

Whereas the Respondent's principal contentions are:

1. By conducting an investigation and by giving the Applicant an opportunity to respond, while apprising him of his right to counsel, the Secretary-General respected the Applicant's due process rights.

2. The United Nations Charter requires the highest standards of efficiency, competence, and integrity and the Secretary-General may take account of relevant statements and conduct to assess whether a staff member meets such standards.

The Tribunal, having deliberated from 2 to 25 July 1997, now pronounces the following judgement:

I. The Applicant was a staff member of UNHCR from April 1991 to 31 March 1995, when his fixed-term contract expired. The contract was not renewed, following an investigation into allegations of misconduct against him. These allegations were transmitted to the Applicant on 24 September 1993, for his comments, which he provided on 17 October 1993. Thereafter, the Applicant was granted a one-year reappointment. In February 1994, the new Director, Division of Human Resources Management (DHRM), UNHCR, met the Applicant to discuss the allegations of misconduct. Following further correspondence on the matter, the Applicant was informed in May 1994, that his appointment would not be renewed after its expiration in October 1994. It is that decision which the Applicant challenges.

II. A memorandum dated 12 July 1994, from the Director, DHRM, UNHCR, to the High Commissioner indicates that the reason for the non-renewal of the Applicant's appointment was the allegation of misconduct, namely that the Applicant had offered to assist a group of refugees in the Dominican Republic to enter the U.S.A. by illegal means, for a large sum of money. Interviews with these refugees and their family members in the U.S.A. were conducted during the course of the September 1993 investigation. They brought into evidence a tape recording of a telephone conversation in which the Applicant made a statement suggesting that illegal arrangements could be made and indicating the high cost of such arrangements. The Applicant concedes making this statement, but contends that he did so due to fear, that it was a foolish effort to diffuse tension and hostility, and that a further statement that he would not be involved in such an illegal undertaking was omitted from the tape recording, which he alleges had been tampered with. The Respondent concedes that the tape recording was spliced together, but maintains that the Applicant's statement was an integral portion of the recording and was sufficient justification for the non-renewal of his appointment.

III. Immediately upon receiving an allegation of misconduct against the Applicant, UNHCR initiated an investigation, in accordance with the Staff Regulations and Staff Rules. The record indicates that the investigation was concluded by the Applicant's supervisor, who forwarded his conclusions to the Deputy High Commissioner with a recommendation that the Applicant be reprimanded. However, following the response made by the Applicant to the allegations against him, no findings or recommendations were transmitted to him, nor was he reprimanded. An offer of reappointment was extended to the Applicant. The Applicant contends that the investigation was re-opened in February 1994, and that this constitutes double jeopardy. The Tribunal holds that although the offer of reappointment made to the Applicant did not constitute notice to him that the investigation had been concluded, the investigation had in fact been concluded by the Director, DHRM, UNHCR, before his departure from the post. The Director's recommendation that the Applicant be reprimanded was never implemented.

IV. In February 1994, a new Director, DHRM, UNHCR, reviewed the report of the former Director and re-opened the investigation. As a result, the Administration decided to allow the Applicant's appointment to expire. This decision was taken, purportedly, in the interest of the Applicant, as evidenced by a memorandum dated 12 July 1994, from the Director, DHRM, UNHCR, to the High Commissioner. He stated that, unlike disciplinary procedures, non-renewal of the Applicant's contract would leave no official mark on the Applicant's record. The memorandum stated: "I am confident that should UNHCR present this case formally in New York, summary dismissal would be decided upon". Based on this assumption, the Applicant was denied the opportunity he would have had through disciplinary proceedings to establish his innocence. The Tribunal agrees with the conclusion of the Joint Appels Board that this

decision, in effect, constituted a presumption of guilt. It resulted in the non-renewal of the Applicant's appointment and denied him the due process to which he was entitled under the Staff Regulations and Staff Rules, and which he would have received had the case been referred to a joint disciplinary committee, or even if the Applicant had been summarily dismissed.

V. The Tribunal notes that, in some circumstances, a decision to allow a staff member's appointment to lapse without undertaking formal disciplinary proceedings against the staff member for misconduct may well be in the interest of the staff member. However, such an arrangement must be made with the consent of both the staff member and the Administration. The Tribunal stresses that the option of administrative, as opposed to disciplinary action, should only be resorted to when it does not prejudice or damage the position of the staff member in question. (Cf. Judgement No. 610, Ortega (1993), para. VIII). In this case, the Applicant was vehemently opposed to resolution of the matter by allowing his contract to expire. He wanted, and was entitled to have, an opportunity to rebut the allegations of his alleged misconduct. A memorandum by the Director, DHRM, dated 14 October 1993, recommended that the Applicant be reprimanded rather than be subjected to disciplinary action, as his behaviour was "due to his inexperience and lack of guidance rather than to dishonesty". This recommendation was not implemented. The Administration decided later that the Applicant's behaviour did constitute "serious misconduct". Despite this decision, the Administration did not proceed with disciplinary measures. The Administration did not follow its own established procedures. It thereby deprived the Applicant of the procedural safeguards set forth in the rules governing disciplinary proceedings.

VI. The Tribunal is not in a position to conduct a fact-finding proceeding ab initio in respect of a disciplinary matter. However, the Tribunal finds that, due to the Respondent's failure to provide the Applicant the due process that must be accorded in disciplinary matters, the Applicant is entitled to compensation which the Tribunal assesses at twelve months of his net base salary at the rate in effect on the date of his separation from service.

VII. For the foregoing reasons, the Tribunal orders the Respondent:

(1) To pay to the Applicant twelve months of his net base salary at the rate in effect on the date of his separation from service.

(2) To expunge from the Applicant's official status file all documents relating to the incident as being prejudicial to him.

VIII. The Tribunal rejects all other pleas, including the Applicant's request for the production of further documents.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary